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No. 81-2020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and
UNITED DISTRIBUTION COMPANIES
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, et al.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

APPELLANTS' REPLY MEMORANDUM

JOHN H. CHEATHAM, III
Vice President, General Counsel and Secretary
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
1660 L Street, N.W.
Washington, D.C. 20036
Attorney for
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

C. WILLIAM COOPER
159 Town Hall Square
Falmouth, Massachusetts 02540
Attorney for
UNITED DISTRIBUTION COMPANIES

DAVID G. HANES*
RICHARD M. MERRIMAN
JOHN D. MCGRANE
REID & PRIEST
1111 - 19th Street, N.W.
Washington, D.C. 20036
(202) 828-0100
Attorneys for Appellants

*Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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APPELLANTS' REPLY MEMORANDUM

The Consumer Energy Council of America, et al. ("CECA") filed on September 3, 1982, a joint Memorandum ("CECA Mem.") in response to appellants' Jurisdictional Statement ("No. 81-2020 J.S."), arguing that this Court should grant plenary consideration limited solely to the constitutionality of the one-house veto. The Solicitor General filed on September 9, 1982, a Memorandum for the United States ("U.S. Mem.") in response to appellants' Jurisdictional Statement, arguing that this Court should limit plenary consideration to the one-house veto and the severability of Section 202(c) of the Natural Gas Policy Act of 1978 ("NGPA").

CECA's suggestion rests on the assumption that an appeal where a United States statute has been held unconstitutional does not warrant plenary consideration unless the constitutional issue must be reached by this Court. CECA Mem. at 8-9. To like effect, excepting the severability issue, is the Solicitor General's recommendation. U.S. Mem. at 19-21.

[1] Pursuant to Rule 28.1 of the Court, appellants' member corporations, and where applicable, parents, subsidiaries and affiliates thereof, are listed in an appendix to appellants' Jurisdictional Statement.

Both suggestions ignore the well-settled principle "that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons will inquire first into the statutory question." *Harris* v. *McRae*, 448 U.S. 297, 306-07 (1980); *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) (Frankfurter, J.) (not to pass on constitutional questions unless such adjudication is unavoidable "is one doctrine more deeply rooted than any other in the process of constitutional adjudication"); *see Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it").

There is no reason for this Court to depart from its settled practice. Furthermore, a decision by this Court either that the Federal Energy Regulatory Commission ("FERC") order was not properly revoked, or that Section 202(c) of the NGPA is not severable from the rest of Phase II, would make constitutional adjudication of the one-house veto entirely inappropriate on mootness or inability to grant relief grounds. Both of these principles have their genesis in the case or controversy requirements of Article III of the Constitution and to that extent these issues are fundamental to the Court's jurisdiction. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

CECA's suggestion in its Memorandum at 9 n.4, that the unconstitutional delegation question is not at issue ignores the fact that it was considered, discussed, and decided by the court below. App. at 76a-80a.[2] Since the delegation question is intimately and inextricably intertwined with the severability question, *see* No. 81-2020 J.S. at 19, 25-27, it would make no sense to preclude briefing of the former (as suggested in CECA Mem. at 9), while allowing briefing of the latter (as suggested in U.S. Mem. at 20).

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[2] All references to "App." are to the Appendix to Jurisdictional Statement submitted April 29, 1982 by the Process Gas Consumers Group, et al., in a related case, No. 81-2008.

The Solicitor General's suggestion in his Memorandum at 20 that consideration of the delegation question would be "premature" is misleading. Correctly observing that the FERC proposed rule will not go into effect if the one-house veto is constitutional, and that there will be further proceedings before FERC if the veto is unconstitutional and severable (and not moot), the Solicitor General fails to add that consideration of the one-house veto issue is "premature" in the same sense, i.e., the rule will not go into effect if the delegation is unconstitutional, and there will be further proceedings before FERC if the delegation is constitutional (and not moot). The one constitutional question is no more premature than the other.

The Court should permit briefing and argument on all four questions presented by appellants.

Respectfully submitted,

JOHN H. CHEATHAM, III
Vice President, General Counsel and Secretary
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
1660 L Street, N.W.
Washington, D.C. 20036
Attorney for
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

C. WILLIAM COOPER
159 Town Hall Square
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UNITED DISTRIBUTION COMPANIES

DAVID G. HANES*
RICHARD M. MERRIMAN
JOHN D. MCGRANE
REID & PRIEST
1111 - 19th Street, N.W.
Washington, D.C. 20036
(202) 828-0100
Attorneys for Appellants

*Counsel of Record

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